Supreme Court, U.S.
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No. 05-___

In The

Supreme Court of the United States

KEVIN Y. PADOT,

Petitioner,

v.

BRENDA G. PADOT,

Respondent.

On Petition For A Writ Of Certiorari To The Second District Court Of Appeal Of Florida

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Where a veteran has elected to take military disability pay in lieu of retired pay, may state courts, in contravention of federal statutes, 10 U.S.C. 1408 and 38 U.S.C. 5301, and this Court's ruling in *Mansell v. Mansell*, 490 U.S. 581 (1989), nonetheless require former servicemembers to remit to former spouses a part of that foregone pay, even without an indemnification provision in the divorce property settlement?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Kevin Y. Padot, respectfully prays that a writ of certiorari issue to review the December 15, 2004, judgment and opinion of the Second District Court of Appeal of Florida in the above-captioned proceeding.

OPINIONS BELOW

Petitioner seeks review of the opinion and judgment of the Florida Second District Court of Appeal of December 15, 2004, styled as *Padot v. Padot* (Docket Nos. 2D03-1011 & 2D03-3843), and reported at 891 So. 2d 1079 (Fla. Dist. Ct. App. Dec. 15, 2004), and reprinted at App. 1a. The Florida District Court of Appeal's decision came as an appeal of an Order issued by the Circuit Court of Pinellas County, Florida, of November 12, 2002, which was unreported, but is reprinted at App. 16a, confirmed on motion for rehearing on January 22, 2003. See App. 21a.

STATEMENT OF JURISDICTION

Petitioner seeks review from the opinion and judgment of the Florida District Court of Appeal of December 15, 2004. The Florida Supreme Court denied review of that decision on October 3, 2005. See App. 15a.

On December 21, 2005, an Application to extend the time to file a Petition for Certiorari in this case from January 1, 2006, to February 24, 2006, was filed. Such Application was granted by Justice Kennedy on December 28, 2005.

The U.S. Supreme Court has jurisdiction to review cases from state courts by virtue of 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This Petition implicates the power of states to override provisions of acts of Congress, in contravention of the Supremacy Clause of Article VI of the federal Constitution. See U.S. CONST. Art. VI, cl. 2 ("The Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

The federal statutes specifically at issue in this case are the Uniformed Services Former Spouses' Protection Act (USFSPA), codified at 10 U.S.C. § 1408, the relevant provisions of which are reprinted at App. 24a, as well as the nonattachment and exempt status provisions of the Veterans' Benefits Act (VBA), codified at 38 U.S.C. § 5301, reprinted at App. 32a.

STATEMENT

1. a. In exercise of its powers under the Constitution, U.S. CONST. art. I, § 8, cls. 12 (Raise and Support Armies Clause) & 14 (Regulation of Armed Forces Clause), Congress has prescribed a wide array of benefits to the men and women who have served with honor in the United States armed forces. Among these benefits are the retired and retention pay that is rendered to enlisted personnel and officers who serve a statutorily-prescribed period of time on active duty (typically 20 years), and (though retired) are still obliged to comport themselves in accordance with the Uniform Code of Military Justice and are subject to recall for active duty. See 10 U.S.C. §§ 1401 et seq.

Analytically distinct from retired or retention pay are veterans' disability benefits, including disability pay, which is

offered those former service members (separated from active duty or retired) who have been found by the Veterans Administration to have actually accrued service-related disabilities. See 38 U.S.C. §§ 1101, 1110, 1131 et seq. Up until very recently,[1] a veteran who was eligible for both retired pay and disability compensation was required to elect one or the other. See 10 U.S.C. § 1414; 38 U.S.C. § 5305. Since disability pay, unlike retired pay, is not subject to federal income tax, see 38 U.S.C. § 5301(a)(1); App. 32a, veterans have tended to select the receipt of disability pay.

b. Up until the early 1980's it was a matter of some controversy whether military retired pay was even divisible as a community asset in divorce proceedings involving a former member of the armed forces. In a 1981 decision, this Court in *McCarty v. McCarty*, 453 U.S. 210 (1981), ruled that federal law precluded state courts from dividing military nondisability retired pay pursuant to state community property laws. See id. at 235. This Court made clear in *McCarty* that disability compensation was an entirely different benefit, although subject to the same rules of federal preemption. See id. at 213.

In response to *McCarty*, Congress legislated in 1982 the Uniformed Services Former Spouses' Protection Act (USFSPA), codified at 10 U.S.C. § 1408; App. 24a. For the purposes of the present Petition, the crucial provisions of USFSPA concern

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[1] See National Defense Authorization Act, 2004, Pub. L. No. 108-136, § 641, 117 Stat. 1392 (2003), which allows a phase-in of full concurrent receipt of military retired pay and veterans disability compensation for certain military retirees (those whose disability rating exceed 50% and satisfy other eligibility criterion). This possibility of concurrent receipts of retirement pay and disability compensation is not otherwise at issue in this case.

Congress's grant to state courts of the authority to treat retired pay as property "solely of the [service] member or as property of the member and his spouse in accordance with the law of the jurisdiction. . . ." See 10 U.S.C. § 1408(c)(1); App. 26a. USFSPA by no means required states to treat military retired pay as divisible property, but merely allowed them to do so without any federal preemptive effect, should state community property or divorce settlement laws so prescribe.[2] In any event, Congress took care in USFSPA to define what "disposable retired pay," id., was subject to division with a former spouse. Among the amounts required to be deducted from total retired pay, in order to calculate disposable retired pay, are any amounts that a veteran was obliged to waive as a condition of receiving disability compensation. See 10 U.S.C. § 1408(a)(4)(B); App. 26a.

An additional feature of USFSPA was an automatic payment procedure by which former spouses could directly receive court-ordered increments or shares of a veteran's retired pay, provided that certain statutory requisites were satisfied by the former spouse. See 10 U.S.C. § 1408(d). In addition, Congress imposed a percentage cap on amounts of a veteran's retired pay that could be directly remitted under this scheme. See 10 U.S.C.

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[2] Community property states had traditionally sought to include military retired pay as a marital asset. After USFSPA, most, but not all, of remaining states have, in fact, adopted statutory or common law rules of construction allowing the treatment of military retired pay as a marital asset subject to division upon divorce. See A Report to Congress Concerning Federal Former Spouse Protection Laws, Sept. 4, 2001, Appendix C, available at http://www.dod.mil/prhome/spouserev.html (visited Feb. 3, 2006) [hereinafter "DoD 2001 USFSPA Report"]. This Report was prepared in accordance with the congressional mandate of the National Defense Authorization Act, FY 1998, § 643, Pub. L. 105-85, 111 Stat. 1629 (1997).

§ 1408(e)(1); App. 28a. Congress also prescribed a carefully-constructed savings clause to govern situations where state courts ordered remissions of retired pay in excess of the statutory caps applicable to the automatic pay scheme:

> Nothing in this section shall be construed to relieve a [service] member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out of disposable retired pay under this section have been made in the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4). Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under this section in any case in which the maximum amount permitted under paragraph (1) has been paid. . . .

10 U.S.C. § 1408(e)(6); App. 30a.

c. Any hopes that the enactment of USFSPA would conclusively and completely resolve the status of veterans' retired pay as marital property subject to division at divorce were quickly dashed. Indeed, state courts quickly proved their aptitude in evading USFSPA's restrictions in order to settle additional benefits on the former spouses of service members. Indeed, this Court was obliged in 1989, in *Mansell v. Mansell*, to address virtually the precise issue raised in this Petition: whether state courts "may treat as property divisible upon divorce military retirement pay waived by the retiree in order to receive veterans' disability benefits." 490 U.S. 581, 583 (1989). Writing for a majority of the Court (with O'Connor and Blackmun, JJ., dissenting), Justice Marshall concluded that "they may not." Id.

The *Mansell* Court was faced with a state court divorce decree and property settlement that was much more ambiguous than the one presented here: Major Gerald Mansell agreed, at the time of his divorce, that his former wife, Gaye Mansell, would receive "50 percent of his total military retirement pay, including that portion of retirement pay waived so that [he] could receive disability payments." Id. at 586. Four years later, Major Mansell requested a modification of his divorce decree by removing the provision requiring him to share his total retired pay with his former spouse. Id. California courts denied his motion, despite his challenge that such a ruling conflicted with both USFSPA and the anti-attachment provision of the Veterans' Benefits Act (at the time of the *Mansell* decision, codified at 38 U.S.C. § 3101(a), and now at id. § 5301(a); App. 32a).

Basing its holding on USFSPA, and declining to reach the nonattachment statute as an independent ground, 490 U.S. at 581 n.6, this Court held that USFSPA specifically preempted a state court's attempt to treat disability pay as a part of a veterans' disposable retired pay, subject to division as part of marital property under that statute. See id. at 588-90 (construing 10 U.S.C. § 1408(a)(4)(B); App. 26a, and id. § 1408(e)(6); App. 30a). The Court reached this conclusion, even as it acknowledged that "Congress, when it passes general legislation, rarely intends to displace state authority" over family law issues, and that this Court "will not find preemption absent evidence that it is '"positively required by direct enactment"'." Id. at 587 (quoting *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979), and citing *Rose v. Rose*, 481 U.S. 619, 628 (1987)). Indeed, the *Mansell* Court concluded that "[t]he instant case, however, presents one of those rare instances where Congress has directly and specially legislated in the area of domestic relations." Id.

And, unlike the situation in the wake of this Court's decision in *McCarty*, Congress appears to have acquiesced in this

Court's construction of USFSPA to the effect that amounts owing to a veteran as disability pay are not subject to being divisible as marital property upon divorce. Despite the fact that Congress has amended USFSPA no less than eight times after the *Mansell* decision was rendered, see App. 31a, in no instance has Congress chosen to disturb that ruling or to otherwise amend the statute in a way material to the issues raised in this Petition. As will be discussed presently, however, state courts have not been so respectful of this Court's ruling in *Mansell*, necessitating this Petition and this Court's intervention.

2. a. Petitioner, Kevin Y. Padot, married Respondent, Brenda G. Padot, on September 6, 1980. In a Final Judgment, issued by the Circuit Court for Bay County, Florida, on February 1, 1995, they were divorced. See App. 2a. In that Judgment, the court specifically reserved jurisdiction to determine the equitable division of marital assets and liabilities. See id.

In a Supplemental Order of March 17, 1995, the Florida Circuit Court divided Petitioner's military retired pay with his former spouse. See id. Kevin Padot served in the U.S. Air Force from April 1980 until May 2000. At the time of his divorce, he was still on active duty in the armed forces, needing six more years of service to become statutorily eligible to draw retired pay upon his separation from his service. See App. 16a-17a.

The Florida Circuit Court nevertheless awarded Respondent a percentage of Mr. Padot's retired pay, as property, if and when he began receiving it. See id. The Supplemental Order contained a provision to the effect that "[n]either party shall take any action which shall alter or otherwise reduce the interest of the other party in the retainer pay, retired pay, deferred compensation, or other military benefit." Id. (quoting ¶ 2(b)(11) of the Order). The Supplemental Order did not, however, value the retirement pay nor contain an indemnification provision which

required Mr. Padot to compensate Respondent, in the event that his military retired pay was reduced for whatever reason. See App. 7a-8a. Nor did the Supplemental Order award Respondent with a sum certain to be paid by Mr. Padot from his retired pay, or incorporate by reference a property settlement agreement concluded by the parties. See id. Finally, nothing in the Order mentioned the disposition of Petitioner's disability pay, in the event he received any. The Order did give the Florida Circuit Court continued jurisdiction "to enforce the former spouse's rights to her share of the above-described benefits." App. 8a (quoting ¶ 2(b)(16) of the Order).

Mr. Padot retired from the Air Force on May 1, 2000, at the rank of E-6 (Technical Sergeant) and received his first military retirement pay in June 2000. See App. 2a. As part of the retirement process, Mr. Padot sought review of his medical records and received a 30% disability rating from the U.S. Veterans Administration. See id. As a consequence, Petitioner, in December 2000, was required by law to waive 30% of his retired pay in order to receive an equal amount of non-taxable disability pay. See id. After a period of underemployment, in April 2001, Mr. Padot was hired by the federal government as a civilian air-traffic controller, a position he had held during his military service. See App. 2a-3a, 17a.

b. Because Mr. Padot's retirement pay was reduced by his disability rating and election to take disability pay, his former wife's share of retirement pay as property was likewise diminished. In July 2002, Respondent filed a motion in Pinellas County Circuit Court to enforce the 1995 Final Judgment and Supplemental Order, claiming that Mr. Padot's waiver of retired pay in preference for disability pay, was a violation of the court's orders, as was an election taken in regard to Petitioner's military survivor benefit plan. See App. 3a. (That second issue is not before this Court.)

In a November 12, 2002, Order, see App. 16a, the Florida Circuit Court ruled that Mr. Padot was required to reimburse Respondent for her share of the lost retired pay he had waived as a result of receiving disability pay. See App. 18a-20a. The Circuit Court acknowledged the apparent tension between Florida's jurisprudence on this subject, and this Court's ruling in *Mansell v. Mansell*, 490 U.S. 581 (1989), see App. 17a-18a, but ruled that the equities of the situation (including the fact that Petitioner had a source of income other than his retired and disability pay) required that he reimburse his former wife, even though the divorce decree did not require that he indemnify her in these circumstances. See App. 18a-20a.

In response to a motion for reconsideration, the Florida Circuit Court confirmed, see App. 21a, that it understood the controlling authority to be the Florida Supreme Court's decision in *Abernethy v. Fishkin*, 699 So.2d 235 (Fla. 1997), and not this Court's earlier ruling in *Mansell*. Rehearing as to the division of military retired pay was thus denied. See id.

c. On appeal, the Florida Second District Court of Appeal affirmed with respect to this ruling on military retired and disability pay. See App. 3a-9a, 13a. The Florida Court of Appeal held, consistent with the trial court's judgment, that this Court's ruling in *Mansell* was distinguishable to the circumstances here, because Mr. Padot was still on active duty at the time of his divorce and had (at least currently) a source of income aside from the receipt of military retired or disability pay. See App. 4a-6a.

The Florida Court of Appeal went on to hold that the Florida Supreme Court's decision in *Abernethy* was controlling, even though in that case the divorce decree required the former servicemember to indemnify his ex-spouse in the event that he reduced his military retired pay by electing to take disability pay

in its stead. See App. 7a. The Florida Court of Appeal, relying on Tennessee case law, see App. 8a-9a (quoting *Johnson v. Johnson*, 37 S.W.3d 892 (Tenn. 2001)), ruled that Petitioner's agreement to "take [no] action which shall alter or otherwise reduce the interest of the other party in the . . . retired pay," was tantamount to an indemnification promise and that Florida courts have the equitable power to ensure that former spouses receive, as a "vested interest," a percentage of all of the military retired pay that was due them. See App. 9a.

d. Discretionary review in the Florida Supreme Court was sought by Petitioner for this aspect of the Florida Court of Appeal's ruling. Review was denied on October 3, 2005. App. 15a. This timely Petition (in light of Justice Kennedy's December 28, 2005, grant of an application extending the time for filing) follows.

REASONS FOR GRANTING THE PETITION

STATE COURTS ARE SHARPLY DIVIDED AS TO THE PROPER TREATMENT OF VETERANS' DISABILITY PAY, TAKEN IN LIEU OF MILITARY RETIRED PAY, IN DIVORCE DECREES

This Petition calls for the Court to reconsider the nettlesome connection between federal statutes governing the disposition of federal veterans' benefits and the traditional authority of state courts over the making and enforcement of property decrees arising from divorce. This issue has required the Court's attention on a number of occasions in the last quarter-

century, see, e.g., *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979); *McCarty v. McCarty*, 453 U.S. 210 (1981); *Rose v. Rose*, 481 U.S. 619 (1987); and *Mansell v. Mansell*, 490 U.S. 581 (1989).

It requires this Court's review now because state supreme courts and appellate courts are in manifest division as to the proper construction of the relevant federal statutes involved here – the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. § 1408; App. 24a, and the nonattachment provision of the Veterans' Benefits Act (VBA), 38 U.S.C. § 5301; App. 32a. In addition, state courts – including the Florida Court of Appeal in the decision for which review is sought here; see App. 3a-9a – are clearly unsettled as to the preemptive effect that federal benefits statutes should have on the enforcement of state law divorce property decrees. Finally, many state courts appear to be either in open defiance of this Court's earlier rulings in *Mansell* and *McCarty*, or (at a minimum) striving mightily to develop untenable and problematic ways to distinguish this Court's holding that USFSPA preempts state laws that have the effect of devolving on a former spouse funds that are attributable to a veteran's receipt of disability pay. See 490 U.S. at 583, 594-95.

1. This Petition essentially asks the Court to resolve a number of matters left outstanding from its previous decisions in *Mansell* and *McCarty*.

a. As already discussed, this Court's ruling in *Mansell* settled the question of whether a veterans' disability benefits could be divided under state law community property theories. See 490 U.S. at 586 n.6 ("we decide that the Former Spouses' Protection Act precludes States from treating as community property retirement pay waived to receive veterans' disability benefits. . . ."). But this Court appeared to leave open

the question of whether a state court could justify a division of veterans' disability pay on other grounds. In an enigmatic footnote, this Court noted:

> In a supplemental brief, Mrs. Mansell argues that the doctrine of res judicata should have prevented this pre-*McCarty* property settlement from being reopened. The California Court of Appeal, however, decided that it was appropriate, under California law, to reopen the settlement and reach the federal question. Whether the doctrine of res judicata, as applied in California, should have barred the reopening of pre-*McCarty* settlements is a matter of state law over which we have no jurisdiction. The federal question is therefore properly before us.

490 U.S. at 586 n.5.[3] As will be shown presently, many state courts have seized on this language to create a "res judicata" exception to USFSPA's bar on state courts allocating, in a divorce decree, disability pay as part of a veteran's retired pay.

Reduced to its essentials, the holding in *Mansell* is that when no prior order and no prior agreement exists, federal law requires that disability benefits be awarded to the owning spouse, and state law to the contrary is preempted. The issue presented here is whether a state court may construe a divorce decree that does not even mention disability pay, and that does not purport to indemnify a former spouse for an election of

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[3] Nor is there any doubt that a federal question is properly before the Court in this case. The Florida Appeal Court clearly relied upon (or at least sought to distinguish) federal law as the basis of its decision, see App. 4a-6a, and did not expressly invoke state law res judicata grounds for its holding.

disability pay in lieu of retired pay, as nonetheless being an equitable agreement to pay such benefits, despite the contrary provisions of federal law.

b. The relevant federal law is not only the applicable provisions of USFSPA, which formed the basis of this Court's holding in *Mansell*, but also the anti-attachment clauses of the Veterans' Benefits Act (VBA), 38 U.S.C. § 5301(a); App. 32a. The *Mansell* Court expressly declined to rule on that ground of federal preemption, being content to stand on its construction of USFSPA. See 490 U.S. at 587 n.6. As will be discussed below, the VBA (as recently amended and strengthened by Congress) is a significant element in this case.

Also worthy of attention is the fact that state courts, in responding to *Mansell*, have sought to recharacterize a veterans' disability pay as some other sort of marital property or benefit (such as alimony) and make an off-setting award to the former spouse to compensate for a lost share of retired pay income. This arguably occurred in this case. See App. 9a. But this Court earlier warned, in its *McCarty* decision, that "it is clear that the injunction against attachment is not to be circumvented by the simple expedient of an offsetting award." 453 U.S. at 230 n.22. And, yet, a number of state courts have done precisely that in attempting to allocate military disability to a former spouse, even in the absence of a consensual property settlement or indemnification provision in a divorce decree.[4]

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[4] The decision below (as well as the Florida and Tennessee authorities it relies upon) is in manifest conflict with *Clauson v. Clauson*, 831 P.2d 1257 (Alaska 1992); *In re Strong*, 8 P.3d 763 (Mont. 2000); and *In re Kraft*, 832 P.2d 871 (Wash. 1992) (all prohibiting an offset against disability pay). But see La. Rev. Stat. Ann. 9:2801.1 (where federal law excludes one spouse's benefits from division, court

2. As a consequence of the issues left open in the *McCarty* and *Mansell* decisions, there are today a number of lines of fracture in state court decisions dealing with the proper application of federal veterans' benefits statutes in enforcement of divorce property decrees.

a. One set of these divisions was suggested by the Florida Court of Appeal, App. 3a-9a, insofar as it observed that many state courts have held, notwithstanding *Mansell*, that a recipient of military disability payments may not deprive a former spouse of an equitable interest in receiving a share of retired pay. See App. 9a (relying on *Johnson v. Johnson*, 37 S.W.3d 892, 894 (Tenn. 2001)). Employing these same precedents from other jurisdictions, the Florida Court of Appeal appeared to conclude that states are not preempted from enforcing orders that are res judicata or from reconsidering divorce decrees, even when disability pay is involved.

b. Another set of state court decisions have specifically confronted this Court's ruling in *Mansell* and sought to limit or distinguish it. Some courts have sought to constrain *Mansell* to its facts. After all, Major Mansell was already receiving disability benefits at the time of the dissolution of his marriage; any attempt to divide disability pay as a marital asset would have clearly violated USFSPA. See 490 U.S. at 585. But, according to some state courts, *Mansell*'s facts did not ostensibly speak to the situation where a veteran later decides to forego additional retirement pay in favor of disability pay. Some state courts have seized on this factual nuance as the basis of authority to quantify with certainty the former spouse's interest in a veteran's retired pay, which the former service

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must exclude from division an identical amount of community property in favor of the other spouse).

member is not permitted to frustrate by subsequently voluntarily waiving retired pay.[5] See *Hisgen v. Hisgen*, 554 N.W.2d 494, 497-98 (S.D. 1996); *Abernethy v. Fishkin*, 699 So. 2d 235, 239-40 (Fla. 1997); *In re Marriage of Gaddis*, 957 P.2d 1010, 1013 (Ariz. App. 1997); *In re Marriage of Harris*, 991 P.2d 262, 266 (Ariz. App. 1999); *Johnson v. Johnson*, 37 S.W.3d 892, 896-97 (Tenn. 2001). This may well characterize the approach of the Florida Court of Appeal here. See App. 6a-9a.

In other cases, state courts have enforced divorce decrees or property settlements which provided that the military spouse would indemnify the non-military spouse for any such diminution of retired pay.[6] See *Abernethy*, 699 So.2d at 239-40; *Owen*, 419 S.E.2d at 269-71; *In re Marriage of Strassner*, 895 S.W.2d 614 (Mo. Ct. App. 1995). Some courts, such as the one here, have taken the same approach even without an express indemnity agreement. See *McHugh v. McHugh*, 861 P.2d 113, 115 (Idaho 1993); *Hisgen*, 554 N.W.2d at 495; *In re Marriage of Neilsen*, 792 N.E.2d 844, 849 (Ill. App. 2003); *Krapf v.*

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[5] Other state courts have noted that *Mansell* was decided in the context of a community property state and that its ruling should not affect a state court's decision to award alimony out of a veteran's disability pay. See, e.g., *Steiner v. Steiner*, 788 So. 2d 771, 778 (Miss. 2001); *Riley v. Riley*, 571 A.2d 1261, 1265 (Md. Ct. Spec. App. 1990); *Weberg v. Weberg*, 463 N.W.2d 382, 384 (Wis. App. 1990). Since Petitioner and Respondent mutually disclaimed alimony or spousal support in their divorce decree, see App. 5a, this issue is not directly raised here, although the state trial court appeared to rule that equitably granting Respondent an interest in Mr. Padot's retirement pay was functionally equivalent to an alimony award. See App. 18a.

[6] No such indemnification clause appears in the divorce decree in this case. See App. 7a-8a.

Krapf, 771 N.E.2d 819, 823 (Mass. App. 2002); *Black v. Black*, 842 A.2d 1280, 1285 (Me. 2004); *Hillyer v. Hillyer*, 59 S.W.3d 118 (Tenn. App. 2001). But see *Ashley v. Ashley*, 990 S.W.2d 507 (Ark. 1999); *In re Marriage of Pierce*, 982 P.2d 995 (Kan. App. 1999) (rejecting implied indemnification theory).

Still other state courts have held that the waiver of retirement pay with a corresponding reduction in payments to the non-military spouse was a change in circumstances, which permitted redistribution of marital property or reassessment of support payments. See *In re Marriage of Jennings*, 980 P.2d at 1254-55. Yet other courts have held that if the military retiree waives retired pay to receive disability benefits, the state courts have the equitable power to impose a resulting trust on the money received as disability payments. See *Krapf v. Krapf*, 786 N.E.2d 318, 326 (Mass. 2003); *In re Marriage of Krempin*, 83 Cal.Rptr.2d 134, 143 (Cal. App. 1999). Other courts have emphasized the contractual nature of consensual property divisions upon divorce, and the competence of state courts to enforce such provisions. See *Shelton v. Shelton*, 78 P.3d 507, 508-10 (Nev. 2003); *Poullard v. Poullard*, 780 So.2d 498, 499-500 (La. Ct. App. 2001); *Owen v. Owen*, 419 S.E.2d 267 (Va. App. 1992).

While these state courts have taken slightly different approaches, each achieved a doctrinal end-run around *Mansell*. The common thread in these and other similar cases is the central concept that the nonmilitary former spouse has an inchoate interest in the military retiree's retired pay that can be fixed at the time of divorce, which the retiree should not and will not be permitted to affect. See App. 9a ("the Former Wife obtained a vested interest in a percentage of the Former Husband's military retirement or retainer pay. . . ."). Where the veteran seeks to elect the receipt of disability pay, these state courts have ruled that, *Mansell* notwithstanding, they are at

liberty to modify divorce property settlements to require the effective transfer of a portion of a veteran's disability benefits to a former spouse.

c. But the courts in other jurisdictions have been more respectful of this Court's rulings, resisting the temptation to limit or distinguish *Mansell* to the vanishing point, and to blithely override the preemptive effect of USFSPA. In *Ex parte Billieck*, 777 So. 2d 105 (Ala. 2000), the Alabama Supreme Court held that USFSPA's definition of disposable retired pay, 10 U.S.C. § 1408(a)(4); App. 25a, and this Court's ruling in *Mansell*, ineluctably led to the conclusion that state courts could not modify a divorce property settlement by requiring a veteran to remit disability pay to a former spouse, even where the veteran had agreed (at the time of divorce) to pay a certain percentage of retirement pay which was later foregone in favor of disability pay. See id. at 106-09. See also *Loria v. Loria*, 2006 WL 66359 (Tex. App. Jan. 12, 2006); *Ashley*, 990 S.W.2d at 508-09 (Ark. 1999) (to the same effect).

Kansas courts have reached substantially the same conclusion. In *Matter of the Marriage of Pierce*, 982 P.2d 995 (Kan. App. 1999), the Kansas Court of Appeals ruled that

> *Mansell* makes it perfectly clear that the state trial courts have no jurisdiction over disability benefits received by a veteran. The trial court in this case cannot order Douglas to change the payments back to retirement benefits, and it cannot order him to pay his disability benefits to Priscilla. We conclude the court may not do indirectly what it cannot do directly.

Id. at 998. In a subsequent decision, the Kansas Supreme Court adopted this approach, although ruling that how to characterize a particular veteran's benefits as either retired pay or disability

pay, within the meaning of USFSPA's exclusion clause, 10 U.S.C. § 1408(a)(4)(B), App. 26a, was sometimes a difficult factual matter. See *Matter of the Marriage of Wherrell*, 58 P.3d 734, 737-41 (Kan. 2002).

Other state supreme courts have simply ruled that USFSPA, as interpreted by this Court in *Mansell*, denies state courts the jurisdiction to award former spouses any portion of a veteran's disability pay. See *Clauson v. Clauson*, 831 P.2d 1257, 1262 (Alaska 1992); *Ryan v. Ryan*, 600 N.W.2d 739, 745 (Neb. 1999); see also *Strong*, 8 P.3d at 766 (Mont. 2000) (for a ruling on preemption grounds). Some state intermediate appeals courts have likewise held that the proper interpretation of USFSPA, as construed by *Mansell*, is that divorce decrees cannot be modified in order to transfer a veteran's disability benefits to a former spouse, even where a service member had agreed to share a portion of retirement pay that was later waived to receive disability pay. See *Hapney v. Hapney*, 824 S.W.2d 408 (Ark. App. 1992); *Wright v. Wright*, 594 So. 2d 1139, 1140 (La. App. 1992); *Halstead v. Halstead*, 596 S.E.2d 353 (N.C. App. 2004); *Matter of the Marriage of Reinauer*, 946 S.W.2d 853, 858-59 (Tex. App. 1997); *Keough v. Keough*, 1997 WL 242559 (Va. App. May 13, 1997).

In short, at least six state supreme courts (Alabama, Alaska, Arkansas, Kansas, Montana, and Nebraska), and the intermediate courts of appeals of an additional four jurisdictions (Louisiana, North Carolina, Texas, and Virginia) have taken diametrically the opposite position of that held below by Florida's courts.

2. a. This widely disparate treatment of disability pay in modifications of divorce property decrees involving waived retired pay has not gone unnoticed by the federal agencies charged respectively with the disbursement of veterans' retired

pay and of disability pay, namely the Departments of Defense and Veterans Affairs. In the September 2001 Report prepared by the Department of Defense, at the request of Congress in section 643 of the National Defense Authorization Act, FY 1998, Pub. L. 105-85, 111 Stat. 1629 (1997), it was noted that

> Congress has, on several occasions, chosen to give VA disability compensation a higher priority than payments to former spouses. This is consistent with the treatment historically provided by Congress to VA disability compensation. It has treated it as compensation owed to the member for injuries/wounds incurred in the service of the United States. As such, the Congress has always exempted it from the claims of creditors (it has allowed claims for spousal and child support).

DoD 2001 USFSPA Report, supra note 2, at 3, 81-82. The Department of Defense observed that state courts had given widely variant treatment to disability pay when enforcing an earlier divorce decree that involved waived retired pay, see id. at 52-54 (citing an American Bar Association's April 13, 1999, responses to DoD's inquiries, at 11-12, found at http://www.abanet.org/family/military/nda98.html (last visited Feb. 4, 2006)), and that this would either have to be addressed by Congress or this Court. In any event, the Department of Defense turned aside suggestions that it should institute regulations that would allow the payment of veterans' disability pay to former spouses. It found that this would be a clear contravention of USFSPA, and such a radical change in the law would have to be a matter addressed, in the first instance, by the Veterans Administration, or by Congress. See id. at 82.

Likewise, the Veterans Administration has indicated

that, pursuant to this Court's decision in *Rose v. Rose*, 481 U.S. 619 (1987) (allowing state courts to set child support obligations at levels that veterans would necessarily have to use disability pay to satisfy them), it will allow a garnishment of disability compensation received in lieu of retirement pay to satisfy court-ordered child support, consistent with the nonattachment provision of the Veterans' Benefits Act, 38 U.S.C. § 5301(a). See Statement of John Thompson, Acting General Counsel, Department of Veterans' Affairs, House Committee on Veterans' Affairs, Aug. 5, 1998, *Garnishment of Veterans Affairs Benefits*, available for viewing at http://www.va.gov/OCA/testimony/5AG98AGC_usa.htm (visited Feb. 4, 2006)). Somewhat more controversial was the application of such garnishment for the satisfaction of alimony or spousal support orders, but the VA has apparently been permitting such. See id. The Veterans Administration will not, however, permit the attachment of disability pay as part of a divorce decree. See id.

According to these pronouncements by the relevant federal agencies, it seems clear that the root cause of the widely discordant treatment of veterans' disability pay in state divorce property modification proceedings is not any lack of guidance by the relevant federal statutes on point – USFSPA and the antiattachment provision of the VBA – but, rather, the failure of state courts to give the proper preemptive effect to these laws. That such confusion should persist even after this Court's decision in *Mansell*, with its express holding that USFSPA's treatment of disability pay preempts contrary state law even under the most stringent preemption standards, see 490 U.S. at 587, is deeply troubling and requires this Court's attention.

b. Petitioner needs hardly speculate as to the number of individuals who are potentially affected by this trend in the case law. According to the DoD 2001 USFSPA Report,

supra note 1, at 19, as of April 1, 1999, 1.985 million former service members are receiving retired pay. Assuming even moderate divorce rates and a robust cohort of veterans (a large percentage of which may not have yet been rated for disability), that leaves a large pool of male and female veterans who may find themselves in the situation presented in this case. Indeed, the two million figure surely undercounts the potential class of litigants here, insofar as it excludes those still in the service (and thus not drawing retired or disability pay), even though they may already be divorced and subject to a divorce decree which stipulates as to a future division of retired pay.

3. Even if state courts were unanimous in their holdings that USFSPA does not preempt state court enforcement of divorce decrees involving the division of retired pay later supplanted by disability pay, Petitioner would still refer this issue to the Court's attention in light of its previous ruling in *Mansell*. But state courts have by no means reached such a consensus, and, indeed, as indicated above, have sharply split as to whether such modification proceedings are permissible, and, even if so, under what legal theories they may proceed. The split in state court jurisprudence has not narrowed over time; it has continued to grow.

Likewise, Petitioner believes this is a suitable case for the Court to accept to resolve this matter. The relevant provisions of the divorce decree, see App. 2a, 7a-8a, 16a-17a, are standard. There was no indemnification provision by which a veteran undertakes to compensate a former spouse in the event the veteran seeks to elect disability pay in lieu of retired pay. As even acknowledged by the Florida Court of Appeal, see App. 7a-8a, Petitioner did not purport in the divorce decree to allocate any part of his existing disability pay to the Respondent. Finally, this case does not involve a modification of alimony payments, as both parties to the divorce decree disclaimed any

spousal support. See App. 5a. Simply presented here is the question of whether a state court can, under any legal theory, and consistent with federal law and this Court's ruling in *Mansell*, require a veteran to remit a portion of disability pay in compensation for waived retired pay.

4. a. Without unnecessarily broaching the merits of this issue, Petitioner would merely remark at this stage that this question is settled by the same sensible construction of USFSPA made already by this Court in *Mansell*. Congress has already spoken to the definition of "disposable retired pay" subject to division under USFSPA, 10 U.S.C. § 1408(a)(4)(B); App. 26a, by expressly excluding disability pay from such calculations. Likewise, the savings clause that Congress provided in USFSPA as grounds for state courts to exceed the statutory caps on the automatic remission of retired pay to former spouses, 10 U.S.C. § 1408(e)(6); App. 30a, does not give state courts carte blanche to treat disability pay as retired pay. See *Mansell*, 490 U.S. at 588-90.

The relevant provisions of USFSPA have not changed since this Court's decision in *Mansell*. It would stretch the canons of statutory construction too far to suggest, as the court below appears to, see App. 4a & n.1, that what was found preempted under one statutory scheme is not later to be regarded as preempted under the same scheme. Nor can it seriously be entertained that state courts' reliance – as in the Florida Court of Appeal decision here, see App. 6a-7a (citing *Abernethy v. Fishkin*, 699 So. 2d 235, 237-40 (Fla. 1997) – on principles of state equitable construction of divorce decrees can prevail over a preemptive federal interest.

b. The Florida Court of Appeal's suggestion that federal law does not prevent a divorce decree to be equitably construed to grant a former spouse an interest in disability pay

received in lieu of retired pay, see App. 7a-9a (citing *Johnson*, 37 S.W.3d at 893-94), is manifestly contradicted by the relevant provisions of the Veterans' Benefits Act, 38 U.S.C. § 5301, which provides that

> [p]ayments of benefits due or to become due under any law administered by the Secretary [of Veterans Affairs] shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be . . . exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary.

Id. § 5301(a)(1); App. 32a. And, if this was not enough, Congress has recently amended the VBA and this applicable provision, to

> clarify that, in any case where a beneficiary entitled to compensation, pension, or dependency and indemnity compensation enters into an agreement with another person under which agreement such other person acquires for consideration the right to receive such benefit by payment of such compensation, pension or dependency and indemnity compensation, as the case may be. . . such agreement shall be deemed to be an assignment and is prohibited.

Veterans Benefits Act of 2003, Pub. L. No. 108-183, § 702, 117 Stat. 2651, Dec. 16, 2003, codified at § 5301(a)(3)(A); App. 33a.

Petitioner would thus submit that, in addition to the issues raised under USFSPA, this case is an appropriate vehicle

for the Court to revisit the proper construction of the VBA. And while the Florida Court of Appeal was clearly cognizant of the VBA, see App. 4a-8a, it chose to ignore it in its ruling that no federal statute prevents an allocation of veterans' disability pay. Petitioner is mindful that the VBA issue may well turn on this Court's earlier decisions in *Rose*, 481 U.S. at 630-33 (allowing attachment of disability pay to satisfy child support obligations), and *Ridgway v. Ridgway*, 454 U.S. 46 (1981) (rejecting state court's disposition of a veterans' life insurance policy benefits as either marital property or a constructive trust). And although the logic of the *Rose* decision on the VBA's antiattachment clause drew but a bare majority of this Court's members (with O'Connor, Stevens and Scalia, JJ. writing or joining concurrences), the holding was narrowly drafted to cover only child support obligations, and appeared to specifically exclude alimony or spousal support payments or any general attempt to characterize veterans' benefits as marital property divisible upon divorce. See also *Wissner v. Wissner*, 338 U.S. 655 (1950) (state community property law preempted by VBA anti-attachment provision).

Petitioner would maintain before this Court that it would stretch the VBA's antiattachment provision too far to allow state court modifications of divorce decrees by transferring disability pay to former spouses. Given the wide array of veterans' benefits (not just disability pay), and the broad range of circumstances in which these can become encumbered with debt or contractual obligations, this Court's guidance may well be necessary to avoid a wholesale erosion of veterans' benefits through a variety of attachment schemes. Just as Congress has made clear in USFSPA that disability pay is not to be treated as a form of retired pay subject to division with former spouses, there is no indication that Congress intended that disability pay be made available to satisfy the claims of former spouses in

divorce property settlements. Cf. *Rose*, 481 U.S. at 631 ("state contempt proceedings to enforce a valid child support order coincide[s] with Congress' intent to provide veterans' disability compensation for the benefit of both appellant and his dependents."). Indeed, if anything, Congress appears to be as concerned as ever in strengthening the VBA's antiattachment provision to cover the circumstances raised in this case. See Veterans Benefits Act of 2003, Pub. L. No. 108-183, § 702, 117 Stat. 2651, Dec. 16, 2003, codified at § 5301(a)(3)(A); App. 33a.

c. This case presents an opportunity for the Court to not only clarify the relevant standards of preemption that apply where federal veterans' benefits protections apparently conflict with state divorce decrees, but also to conclusively settle the effect of USFSPA and VBA where state courts purport to award disability pay in the guise of enforcing earlier divorce decrees granting portions of retired pay. Additionally, this Court can delimit the precise scope of its earlier rulings in *McCarty* and *Mansell*, and either announce to state courts that they must faithfully adhere to them or are free to continue experimenting in limiting and distinguishing those holdings. Lastly, and not to be discounted, this Court would have the opportunity to declare a coherent and consistent rule of construction for USFSPA and VBA in cases involving the disposition of disability pay, potentially affecting tens of thousands of veterans and their former spouses attempting to manage their respective financial affairs.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 2006

Appendix

NOT FINAL UNTIL TIME EXPIRES TO FILE
REHEARING MOTION AND IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

KEVIN Y. PADOT,
Appellant,

v.

Case No. 2D03-1011
2D03-3843

BRENDA G. PADOT,
Appellee.

Consolidated

Opinion filed December 15, 2004.
Appeal from the Circuit Court for
Pinellas County; Walt Logan, Judge.

SILBERMAN, Judge.

In this consolidated appeal, Kevin Padot (the Former Husband) challenges orders arising from postdissolution enforcement proceedings regarding his military retirement pay and a military survivor benefit plan. In case number 2D03-1011, we affirm the "Order re Military Retirement" of November 12, 2002, except to the extent that it provides for an income deduction order, and we vacate the clarification order of February 19, 2003. In case number 2D02-3843, we reverse that portion of the Order on Motion for Rehearing of July 24, 2003, that required the Former Husband to cooperate with Brenda

Padot (the Former Wife) to obtain and share the cost of a replacement survivor benefit plan.

BACKGROUND

The parties were married in 1980, and a final judgment of dissolution was entered on February 1, 1995. In the judgment, the trial court reserved jurisdiction to determine, among other things, issues of equitable distribution and alimony. On March 17, 1995, the trial court entered a Supplemental Order resolving the remaining issues. The Supplemental Order indicates that the parties agreed the Former Wife "shall be entitled to direct payment of a percentage of the [Former Husband's] military retirement or retainer pay" and that the parties agreed on a formula to determine that percentage. The percentage was subsequently computed to be 33.96%. The Supplemental Order also provided, "Neither party shall take any action which shall alter or otherwise reduce the interest of the other party in the retainer pay, retired pay, deferred compensation, or other military benefit."

The Former Husband retired from active military duty on May 1, 2000, and he received his first military retirement pay in June of 2000. As part of the retirement process, he applied for and was awarded veterans' disability payments, with the Veterans' Administration (VA) determining that he was 30% disabled. Under federal law, before the Former Husband could receive the disability benefits, he was required to waive an equal amount of his military retirement pay. See *Mansell v. Mansell*, 490 U.S. 581, 583 (1989). A waiver of retirement pay for disability benefits is common because disability benefits are nontaxable. Id. at 583-84. The Former Husband's waiver went through in December of 2000. In April of 2001, the Former Husband became employed by the federal government in a

civilian capacity as an air traffic controller, a position he had held while in the military.

FORMER HUSBAND'S WAIVER OF MILITARY RETIREMENT BENEFITS

In July 2002, the Former Wife filed a Motion to Enforce Final Judgment/Supplemental Order. She contended that the Former Husband's waiver of a portion of his military retirement pay in exchange for disability benefits operated to reduce her share of the military retirement pay, in violation of her rights under prior court orders. Additionally, she claimed that the Former Husband improperly sought to reduce a military survivor benefit plan and that the Former Husband should be required to maintain that plan for the benefit of the parties' minor child.

In the Order re Military Retirement entered on November 12, 2002, the trial court determined that the Former Husband's voluntary election to reduce his retirement pay in exchange for disability benefits worked to his benefit, at the expense of the Former Wife. The trial court concluded that the impact of the election violated the provision contained in the 1995 Supplemental Order that prohibited the parties from taking any action to alter or reduce the other party's interest in retainer pay, retired pay, deferred compensation, or other military benefit. The trial court found that the situation was inequitable and that, under *Abernethy v. Fishkin*, 699 So. 2d 235 (Fla. 1997), it had the ability to enforce the Supplemental Order "so long as no funds from the disability pool are drawn upon to fulfill the obligations" the Former Husband owed to the Former Wife. Because the Former Husband had income from his work as an air traffic controller, the trial court concluded that the

Former Husband would be required to make payments to the Former Wife to fulfill the obligations of the Supplemental Order. The court ordered that payments due to the Former Wife "be computed by applying the percentage of 33.96% to the amount that the former spouse's military retirement would have been absent his voluntary reduction of those retirement dollars in favor of disability payments."

The Former Husband, relying on *Mansell*, contends that principles of federal preemption prohibit the result ordered by the trial court. As noted in *Mansell*, at the time of the divorce Major Mansell was already retired and receiving Air Force retirement pay and disability benefits. He obtained the disability benefits by waiving a portion of his retirement pay. The parties' property settlement agreement provided that "Major Mansell would pay Mrs. Mansell 50 percent of his total military retirement pay, including that portion of retirement pay waived so that Major Mansell could receive disability benefits." 490 U.S. at 586. The state divorce court had ordered Major Mansell to pay a portion of his disability benefits directly to Mrs. Mansell, in accordance with the agreement.

The Supreme Court noted that the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408, provides that "disposable retired or retainer pay" is property subject to division by state courts in divorce proceedings. Id. at 584.[1] The Court explained:

" 'Disposable retired or retainer pay' " is defined

[1] Since *Mansell*, 10 U.S.C. § 1408 has been amended to refer to "disposable retired pay," and retired pay is defined to include retainer pay; however, the amendment does not affect the result here. See 10 U.S.C. § 1408(a)(4), (a)(7) (1994); *Abernethy v. Fishkin*, 699 So. 2d 235, 237 n.1 (Fla. 1997).

> as "the total monthly retired or retainer pay to which a military member is entitled," minus certain deductions. § 1408(a)(4) (1982 ed. and Supp. V). Among the amounts required to be deducted from total pay are any amounts waived in order to receive disability benefits. § 1408(a)(4)(B).

Id. at 584-85. The Supreme Court held "that the Former Spouses' Protection Act does not grant state courts the power to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits." Id. at 594-95.

The situation in *Mansell*, however, is materially distinguishable from the circumstances of the present case. Here, the Former Husband was still in the military at the time of the divorce, and the parties agreed to a formula to determine the percentage of the Former Husband's "military retirement or retainer pay" to which the Former Wife was entitled. The divorce court ordered that neither party shall take any action to reduce the other party's interest in the retainer or retired pay, and the court retained jurisdiction to enforce the Former Wife's rights to her share of the benefits. The court denied "[a]ll requests for periodic and/or rehabilitative alimony" in this fifteen-year marriage.

At the time of the enforcement proceedings, in addition to receiving retainer pay and tax-free disability income, the Former Husband was employed as a civilian air traffic controller. The trial court noted that the disability pay is shielded from the Former Wife, but the court found that the Former Husband's civilian pay was a source of income that would enable him to comply with the 1995 Supplemental Order. The Order re Military Retirement specifically states, "Nothing

in this Order should be read to require the former husband to pay any portion of his disability retirement income from his active military duty time over to the former wife." Rather, the order contemplates payment from a portion of the remaining military retirement benefits and the Former Husband's current civilian income as an air traffic controller. Thus, the trial court's order is distinguishable from the divorce court's order in *Mansell*.

The Former Husband also contends that under *Mansell* and 10 U.S.C. § 1408, the Florida Supreme Court wrongly decided *Abernethy*. In *Abernethy*, the parties had entered into a marital settlement agreement while the former husband, Richard Abernethy, was still on active duty. Their agreement provided that Monica Fishkin, the former wife, would receive 25% of Abernethy's military retirement pay. The final judgment of dissolution

> entitled Fishkin to monthly payments comprised of twenty-five percent of Abernethy's "net disposable retired or retainer pay." The final judgment also prohibited Abernethy from pursuing any course of action which would defeat Fishkin's right to receive her allotted portion of Abernethy's "full net disposable retired or retainer pay" and required Abernethy to indemnify Fishkin for any breach in this regard.

Abernethy, 699 So. 2d at 237 (footnotes omitted). Months later, Abernethy left the Air Force and began receiving military separation benefits. After an enforcement proceeding, he was ordered to pay Fishkin 25% of the separation benefits. Subsequently, Abernethy waived portions of his separation benefits in order to receive veterans' disability benefits. A

second enforcement proceeding ensued.

The supreme court in *Abernethy* determined that federal law preempted the division of veterans' disability benefits either by court order or settlement agreement. Id. at 239. However, the court determined that Fishkin was "entitled to receive payments equal to the amount she was receiving before Abernethy elected veterans' disability benefits." Id. The court reasoned that, unlike in *Mansell*, there was no express provision for the division of disability benefits in the final judgment or settlement agreement. Also, an indemnification provision in the settlement agreement "clearly indicated the parties' intent to maintain level monthly payments pursuant to their property settlement agreement." Id. at 240. The indemnification provision prohibited Abernethy from "pursuing any course of action which would defeat Fishkin's right to receive a portion of his 'full net disposable retired or retainer pay' " and required Abernethy to indemnify Fishkin in that event. Id. Because Abernethy could use other available assets to pay Fishkin rather than disability payments, the court held that the final judgment did not contravene *Mansell*. Id.

The Former Husband contends that apart from being wrongly decided, *Abernethy* is distinguishable because here the Former Husband retired and, at the same time, waived a portion of the retirement benefits in favor of disability benefits. Thus, he argues that the Former Wife never received a steady stream of payments that was later reduced by the waiver. He further argues that the 1995 Supplemental Order did not have an indemnification provision. The Former Husband concludes that the Former Wife is entitled only to 33.96% of his net retainer pay at the time of his retirement.

The parties specifically agreed that the Former Wife was entitled to 33.96% of the Former Husband's "military retirement

or retainer pay," and the Supplemental Order provides that "[n]either party shall take any action which shall alter or otherwise reduce the interest of the other party in the retainer pay, retired pay, deferred compensation, or other military benefit." Although the order does not specifically state that the Former Husband must indemnify the Former Wife if he takes action that reduces her interest, the order gives the court continuing jurisdiction "to enforce the former spouse's rights to her share of the above-described benefits."

In *Janovic v. Janovic*, 814 So. 2d 1096, 1101 (Fla. 1st DCA 2002), the First District stated that when a party merely "seeks to receive what is contemplated by the property settlement agreement incorporated into the final dissolution judgment," then "a trial court may order an equivalent benefit as part of an enforcement action where one spouse takes a voluntary action which defeats the intent of the parties." As in the present case, Mr. Janovic was on active duty when the consent final judgment of dissolution was entered. Less than a year later he was discharged and waived part of his retirement pay to receive disability benefits. The First District held that the subsequent enforcement order requiring Mr. Janovic to indemnify his former wife for the reduction in benefits did not violate *Mansell*. Id. at 1099. The court determined that the lack of an indemnification provision in a settlement agreement is not fatal. Id. at 1101.

We also note that in *Johnson v. Johnson*, 37 S.W.3d 892, 894 (Tenn. 2001), the Tennessee Supreme Court held as follows:

> [W]hen an MDA [marital dissolution agreement] divides military retirement benefits, the non-military spouse obtains a vested interest in his or her portion of those benefits as of the

> date of the court's decree. Any act of the military spouse that unilaterally decreases the non-military spouse's vested interest is an impermissible modification of a division of marital property and a violation of the final decree of divorce incorporating the MDA.

There, the parties' MDA provided that Ms. Johnson would receive, upon retirement, 50% of Mr. Johnson's "military retirement benefits," and after the court entered the final decree, Mr. Johnson waived part of his military retired pay to receive veterans' disability benefits, thereby reducing Ms. Johnson's share. Id. at 893-94.

We agree with the reasoning in *Janovic* and *Johnson* and conclude that the Former Wife obtained a vested interest in a percentage of the Former Husband's military retirement or retainer pay on March 17, 1995, when the trial court entered the Supplemental Order. Thus, when years later the Former Husband took the voluntary action of waiving retainer pay in order to receive disability benefits, the Former Wife's vested interest in his military retirement or retainer pay was reduced. As a result, we find no error in the trial court's conclusion "that equity requires that the former wife be made whole given the totality of the situation concerning the husband's voluntary acts and his ability to supplement and make whole the retirement benefits contemplated in the Final Judgment in favor of the former wife." Thus, we affirm on this issue.

We reject without discussion the Former Husband's alternative argument that the trial court improperly granted the Former Wife the right to share in the Former Husband's separate property. However, the Former Husband also argues, and the Former Wife properly concedes, that section 61.1301, Florida Statutes (2002), does not permit the use of an income deduction

order to effectuate an equitable distribution scheme. See *Motil v. Motil*, 771 So. 2d 1251, 1251 (Fla. 2d DCA 2000). Rather, section 61.1301 limits the use of income deduction orders to payments for alimony or child support. Id. Accordingly, we reverse that portion of the Order re Military Retirement that provides for payment by income deduction order.

JURISDICTION TO ENTER CLARIFICATION ORDER OF FEBRUARY 19, 2003

The trial court rendered its Order re Military Retirement on November 12, 2002, and its order on rehearing on January 22, 2003. Although there was no motion for rehearing directed to the trial court's order of January 22, 2003, the trial court held a telephonic conference with the parties on February 12, 2003.[2] The trial court then entered the clarification order of February 19, 2003, regarding the issue of "retroactivity." The Former Husband argues that the trial court was without jurisdiction to enter the clarification order. The Former Wife contends that the trial court properly entered the clarification order pursuant to Florida Rule of Civil Procedure 1.540(a).

Rule 1.540(a) allows the trial court to correct errors "arising from oversight or omission . . . at any time on its own initiative or on the motion of any party and after such notice, if any, as the court orders." In *Bolton v. Bolton*, 787 So. 2d 237, 238 (Fla. 2d DCA 2001), this court stated as follows:

> A trial court may correct a clerical error "at any time on its own initiative" pursuant to Florida

[2] Our record does not indicate who initiated the telephonic conference.

> Rule of Civil Procedure 1.540(a), but judicial errors, which include errors that affect the substance of a judgment, must be corrected within ten days after entry of the judgment pursuant to Florida Rule of Civil Procedure 1.530, or by appellate review.

See also *Commonwealth Land Title Ins. Co. v. Freeman*, 29 Fla. L. Weekly D1704 (Fla. 2d DCA July 23, 2004). In *Malone v. Percival*, 875 So. 2d 1286 (Fla. 2d DCA 2004), this court held that an addendum to a final judgment of dissolution, which purported to correct scrivener's errors, constituted an unauthorized amendment of the judgment. The addendum made several changes to the final judgment, including an extension of the time period during which child support would be paid. We concluded that the addition of the provision that extended the child support period was a substantive, not clerical, change that was not authorized by rule 1.540(a). Id. at 1288.

Here, the Order re Military Retirement provided that "all sums due and owing to the former wife are retroactive to the date of the former husband's retirement from active military service." The order on rehearing stated that the retroactive date was "the date of the former husband's re-employment as an air traffic controller," and it did not provide for any payments from the time of the Former Husband's retirement until he became employed as an air traffic controller. The clarification order provided for retroactive payments of 33.96% of the Former Husband's retirement pay from May 2000 (when he retired from the military) through November 2000 and to 33.96% of the retirement pay less the amount of the VA waiver for December of 2000 through March of 2001. The order also provided for retroactive payments without a reduction for the amount of the VA waiver beginning in April of 2001, when the Former Husband became employed as an air traffic controller.

We conclude that the clarification order, by changing the period of retroactivity, changed the substance of the prior order on rehearing. The trial court did not make the change pursuant to the procedures of rule 1.530 or rule 1.540, and the change was not an otherwise authorized clerical correction under rule 1.540. Thus, we vacate the clarification order of February 19, 2003.

SURVIVOR BENEFIT PLAN

The Former Husband's survivor benefit plan (SBP) is a military annuity that provides the beneficiary a percentage of the deceased service member's retired pay. On May 12, 2003, the Former Wife filed a motion to enforce the March 17, 1995, supplemental final judgment, alleging that the Former Husband failed to protect her right to receive continuing payments from the military, should the Former Husband predecease her, by naming someone else (his current wife) as the SBP beneficiary. In an order entered June 2, 2003, the trial court denied the Former Wife's request to require the Former Husband "to name her as the beneficiary of his Survivor Benefit Plan." On rehearing, the trial court heard testimony from an expert in military benefits regarding replacement coverage to protect the Former Wife's military benefits should the Former Husband predecease her. In the July 24, 2003, Order on Motion for Rehearing, the trial court required the Former Husband to cooperate with the Former Wife to obtain replacement SBP coverage, with the Former Husband to pay 66.04% of the premium and the Former Wife to pay 33.96% of the premium.

The Former Husband argues that the trial court erred in construing the 1995 Supplemental Order as requiring the Former Husband to elect the Former Wife as the SBP beneficiary. The Former Wife relies upon *Wise v. Wise*, 765 So.

2d 898 (Fla. 1st DCA 2000), and *Johnson v. Pogue*, 716 So. 2d 1123 (Miss. Ct. App. 1998), to support the trial court's decision. In both *Wise* and *Johnson*, however, the final judgment specifically required the former husband to elect the former wife as beneficiary of the military SBP. The 1995 Supplemental Order contains no such directive, and in fact, it does not anywhere mention an SBP.

The Former Wife also argues that the trial court was correct based on the language of the 1995 Supplemental Order that "[n]either party shall take any action which shall alter or otherwise reduce the interest of the other party in the retainer pay, retired pay, deferred compensation, or other military benefit." Although the expert witness testified that the SBP is a military benefit, nothing in the 1995 order gave the Former Wife an interest in an SBP. Rather, the 1995 order gave the Former Wife an interest in "military retirement or retainer pay." Therefore, nothing prevented the Former Husband from changing his SBP. Accordingly, we reverse the July 24, 2003, Order on Motion for Rehearing to the extent that it requires the Former Husband to cooperate to obtain and pay for a portion of the cost for replacement SBP coverage. Based on our disposition of this issue, the Former Husband's other issues concerning the SBP are moot.

CONCLUSION

In summary, we affirm the Order re Military Retirement of November 12, 2002, except to the extent that it provides for an income deduction order; we vacate the clarification order of February 19, 2003; and we reverse that portion of the Order on Motion for Rehearing of July 24, 2003, requiring that the

Former Husband cooperate to obtain and pay for a portion of the premium for a replacement SBP with the Former Wife as beneficiary.

Affirmed in part, reversed in part, and vacated in part.

CASANUEVA and DAVIS, JJ., Concur.

SUPREME COURT OF FLORIDA

MONDAY, OCTOBER 3, 2005
CASE NO.: SC05-386
Lower Tribunal Nos.: 2D03-3843, 2D03-1011
KEVIN Y. PADOT vs. BRENDA G. PADOT

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the petition for review is denied.

No motion for rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

PARIENTE, C.J., and LEWIS, QUINCE, CANTERO and BELL, JJ., concur.

A True Copy

Test:

/s/
Thomas D. Hall
Clerk, Supreme Court

IN THE CIRCUIT COURT FOR PINELLAS COUNTY, FLORIDA

CASE NO. 00-1908FD-24

BRENDA G. PADOT,
Petitioner

VS.

KEVIN Y. PADOT,
Respondent

ORDER RE MILITARY RETIREMENT

The Court has for consideration the former wife's Motion to Enforce Final Judgment filed July 9, 2002. The former husband entered the military April 1980. The parties were thereafter married September 6, 1980. The marriage was dissolved by Final Judgment February 1, 1995. The former husband left active military sen/ice In May 2000. The timeline concerning the military service and the duration of the marriage results in a question concerning the former husband's military retirement.

This file came to the undersigned Court by way of a Petition to Domesticate and Modify and Enforce a Judgment entered in Dade County, State of Florida. The Final Judgment had been entered in Dade County followed by a Supplemental Final Judgment signed March 17, 199S by Circuit Judge DeDee S. Costello.

The former husband was still on active duty when Judge Costello entered the Supplemental Final Judgment. Judge Costello provided at Page 6 in Paragraph (6) for the division of

military benefits. The provision noted 163 months of active duty during the marriage to be divided by the total number of months of creditable service. The resulting fraction would be divided by half to arrive at the former wife's percentage of interest in the military retirement. This court has been requested to do the mathematics and assign a percentage and accordingly has done the math and finds the former wife's share in the former husband's military retirement to be 33.96%.

Judge Costello further ordered In Paragraph (11) of the Supplemental Judgment as follows:

> "... (11) Reduction in Value: Neither party shall take any action which shall alter or otherwise reduce the interest of the other party In the retainer pay, retired pay, deferred compensation, or other military benefit . . . ."

The former husband has applied for and obtained disability benefits. The receipt of the disability benefits are conditioned upon the former husband relinquishing a portion of his normal retirement pay. The process is described in *Abernethy v. Fishkin*, 699 So.2d 235 (Fla. 1997).

The testimony presented to the Court is that the former husband was an air traffic controller while on active duty. After retirement, the husband spent a time involuntarily underemployed, however, the former husband is now employed by the U.S. Government in a civilian capacity as an air traffic controller, The former husband has as sources of income his military retirement that is reduced by the disability payments, the disability payments from the government relating to his military service, and his pay as a civilian air traffic controlling working for the United States Government.

The Court has reviewed case law including *Abernethy*, supra, and *Janovic v. Janovic*, 814 So.2d 1096 (Fla. 1st DCA

2002) which cases address the situation where the former spouse voluntarily elects to transfer part or the former spouse's retirement pay to disability pay. The Court has also reviewed *Mansell v. Mansell*, 490 U.S. 581 (U.S. 1989).

Further review of Judge Costello's March 17, 1995 Supplemental Judgment indicates a denial of alimony to the former wife. Reasonable interpretation of the Supplemental Judgment as a whole could lead a reasonable reviewer to the conclusion that the former wife's share of the military retirement would stand in the place of alimony. Such appeared to be the overall plan set forth in the Supplemental Final Judgment. That plan seems to have been altered by the voluntary action of the former husband which action seems contrary to the provision of Paragraph (11) of the Supplemental Judgment cited above.

The net result that the parties find themselves in today is that the former husband is retired from the military and drawing more from his military service than he would have absent the disability pay. The disability pay carries the advantage of being non-taxable and therefore a dollar for dollar transfer from regular retirement pay to disability inures to the definite benefit of the retired military member/the former husband. Further, under the umbrella of protection provided to the disability pay by federal law, the former husband has further increased the benefit of transferring funds from regular retirement to disability by seeking to shield those funds from the former wife's share as established in the Final Judgment. The net result is a substantial increase derived by the former military member at the expense of his former wife.

Were the facts to end there then perhaps the inequitable nature of the result would be set in place, however, the former husband who has been retired with disability as an air traffic controller from active military duty is now doing the same work

as an air traffic controller at the hire of the U.S. Government in the capacity of a civilian. The pay from the now civilian air traffic controller both inures to his benefit and also provides funds that are not a part of his disability payments which funds are available to supplement the former wife's loss as a result of the former husband's voluntary reduction in retirement pay in favor of disability pay.

The inequity of the present situation in favor of the former husband is undeniable. The Florida Supreme Court has analyzed the scenario set forth in the case at bar in *Abernethy*, supra, and found that Trial Courts are not powerless to enforce the original agreement so long as no funds from the disability pool are drawn upon to fulfiil the obligations of the former husband to the former wife.

The Court finds the equities of the situation to be with the former wife and that the former husband is full well and able to provide with the provision made in the Supplemental Final Judgment by Judge Costello in March 1995.

Nothing in this Order should be read to require the former husband to pay any portion of his disability retirement income from his active military duty time over to the former wife. The Court orders no portion of that pool of funds in whatever amount that pool may be from time to time to be payable over to the former wife.

The Court finds that equity requires that the former wife be made whole given the totality of the situation concerning the husband's voluntary acts and his ability to supplement and make whole the retirement benefits contemplated in the Final Judgment in favor of the former wife.

Accordingly, the Court finds that the payments under the Supplemental Final Judgment shall be computed by applying the percentage of 33.96% to the amount that the former spouse's

military retirement would have been absent his voluntary reduction of those retirement dollars in favor of disability payments. That number shall establish the amount payable on a monthly basis to the former wife by or on behalf of the former husband.

The amount so calculated shall be payable by assignment of the remaining military retirement benefits up to 50% of the amount of the remaining military retirement benefit. The remainder of the allocation due to the former wife shall be payable by Income Deduction Order payable from the former husband's civilian income as an air traffic controller.

Counsel are instructed to confer and apply the appropriate amounts to the directives of this Order and submit appropriate paperwork to the Court for entry.

The Court further finds that all sums due and owing to the former wife are retroactive to the date of the former husband's retirement from active military service. The amount of retroactive payments due/the arrearages shall be payable in equal installments over a two year period bearing the legal rate of interest.

IT IS SO ORDERED in Chambers in St. Petersburg, Pinellas County, Florida this 12th day of November, 2002.

/s/_____

WALT LOGAN, CIRCUIT JUDGE

IN THE CIRCUIT COURT FOR PINELLAS COUNTY, FLORIDA

REF: 00-001908FD-25

UCN: 522000DR001908XXFDFD

BRENDA G. PADOT,
Petitioner

vs.

KEVIN Y. PADOT,
Respondent.

ORDER ON MOTION FOR REHEARING

The Court heard argument on the Motion for Rehearing filed on behalf of the Respondent/former husband. Argument was presented to the Court on January 22, 2003 which proceeding was recorded with a transcript available if ordered.

The Respondent/former husband argues through counsel that the Court misapplied Federal law in holding that the former husband must pay to the former wife an amount equal to the amount of retirement the wife would have been entitled to had the husband not voluntarily applied for disability pay thus converting part of the retirement pay to disability pay. The Court has reviewed the cases cited and has most particularly relied upon *Abernethy v. Fishkin*, 699 So.2d 235 (Fla. 1997). The Court has once again reread *Abernethy*, supra, and concludes that the Motion for Rehearing is not well taken.

Accordingly, the Motion for Rehearing concerning the military pay question is DENIED.

Upon review of the Court's Order and considering the facts of the case presented to date, the Court finds that one modification is appropriate. In the Order of November 12, 2002 the Court found "...that all sums due and owing to the former wife are retroactive to the date of the former husband's retirement from. active, military service..." The Court has reconsidered and finds that the retroactive amount is appropriate from the date of the former husband's re-employment by the Federal government as an air traffic controller at which time the former husband became re-employed at a pay rate that would provide sufficient funds to meet the requirements of the Court Order. Accordingly, the retroactive date shall be the date of the former husband's re-employment as an air traffic controller.

The former husband filed for rehearing/reconsideration with regard to the bankruptcy issue that had been addressed in this Court's Order on Pending Motions which Order was signed December 12, 2002. The Court has considered the additional argument on the question of dischargability of the attorney's fee award to attorney James Obeso and finds that the Motion for Reconsideration is not well taken. Accordingly, the Motion for Reconsideration on the bankruptcy issued is DENIED.

Finally, the former husband moved for reconsideration with regard to the life insurance issue. The Court considered additional argument and finds that the Motion is not well taken. The Court did advise the former husband that as an alternative to providing insurance coverage the former husband may provide documentary proof that in the event of his demise the child support will be payable through income continuation plans

or Social Security. The Court referred the parties to *Browning v. Browning*, 784 So.2d 1145 (Fla. 2nd DCA 2001).

IT IS SO ORDERED in Chambers in St. Petersburg, Pinellas County, Florida this 22nd day of January, 2003.

_/s/_____
WALT LOGAN, CIRCUIT JUDGE

UNITED STATES CODE ANNOTATED

TITLE 10. ARMED FORCES

SUBTITLE A – GENERAL MILITARY LAW

PART II--PERSONNEL

CHAPTER 71--COMPUTATION OF RETIRED PAY

§ 1408. Payment of retired or retainer pay in compliance with court orders.

(a) Definitions.--In this section:

(1) The term "court" means--

(A) any court of competent jurisdiction of any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands;

(B) any court of the United States (as defined in section 451 of title 28) having competent jurisdiction;

(C) any court of competent jurisdiction of a foreign country with which the United States has an agreement requiring the United States to honor any court order of such country; and

(D) any administrative or judicial tribunal of a State competent to enter orders for support or maintenance (including a State agency administering a program under a State plan approved under part D of title IV of the Social Security Act), and, for purposes of this subparagraph, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa.

(2) The term "court order" means a final decree of divorce, dissolution, annulment, or legal separation issued by a court, or

a court ordered, ratified, or approved property settlement incident to such a decree (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or a court ordered, ratified, or approved property settlement incident to such previously issued decree), or a support order, as defined in section 453(p) of the Social Security Act (42 U.S.C. 653(p)), which--

(A) is issued in accordance with the laws of the jurisdiction of that court;

(B) provides for--

(i) payment of child support (as defined in section 459(i)(2) of the Social Security Act (42 U.S.C. 659(i)(2)));

(ii) payment of alimony (as defined in section 459(i)(3) of the Social Security Act (42 U.S.C. 659(i)(3))); or

(iii) division of property (including a division of community property); and

(C) in the case of a division of property, specifically provides for the payment of an amount, expressed in dollars or as a percentage of disposable retired pay, from the disposable retired pay of a member to the spouse or former spouse of that member.

(3) The term "final decree" means a decree from which no appeal may be taken or from which no appeal has been taken within the time allowed for taking such appeals under the laws applicable to such appeals, or a decree from which timely appeal has been taken and such appeal has been finally decided under the laws applicable to such appeals.

(4) The term "disposable retired pay" means the total monthly retired pay to which a member is entitled less amounts which--

(A) are owed by that member to the United States for previous overpayments of retired pay and for recoupments required by

law resulting from entitlement to retired pay;

(B) are deducted from the retired pay of such member as a result of forfeitures of retired pay ordered by a court-marital or as a result of a waiver of retired pay required by law in order to receive compensation under title 5 or title 38;

(C) in the case of a member entitled to retired pay under chapter 61 of this title, are equal to the amount of retired pay of the member under that chapter computed using the percentage of the member's disability on the date when the member was retired (or the date on which the member's name was placed on the temporary disability retired list); or

(D) are deducted because of an election under chapter 73 of this title to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired pay is being made pursuant to a court order under this section.

(5) The term "member" includes a former member entitled to retired pay under section 12731 of this title.

(6) The term "spouse or former spouse" means the husband or wife, or former husband or wife, respectively, of a member who, on or before the date of a court order, was married to that member.

(7) The term "retired pay" includes retainer pay.

* * * *

(c) Authority for court to treat retired pay as property of the member and spouse.--(1) Subject to the limitations of this section, a court may treat disposable retired pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such

court. A court may not treat retired pay as property in any proceeding to divide or partition any amount of retired pay of a member as the property of the member and the member's spouse or former spouse if a final decree of divorce, dissolution, annulment, or legal separation (including a court ordered, ratified, or approved property settlement incident to such decree) affecting the member and the member's spouse or former spouse (A) was issued before June 25, 1981, and (B) did not treat (or reserve jurisdiction to treat) any amount of retired pay of the member as property of the member and the member's spouse or former spouse.

(2) Notwithstanding any other provision of law, this section does not create any right, title, or interest which can be sold, assigned, transferred, or otherwise disposed of (including by inheritance) by a spouse or former spouse. Payments by the Secretary concerned under subsection (d) to a spouse or former spouse with respect to a division of retired pay as the property of a member and the member's spouse under this subsection may not be treated as amounts received as retired pay for service in the uniformed services.

(3) This section does not authorize any court to order a member to apply for retirement or retire at a particular time in order to effectuate any payment under this section.

(4) A court may not treat the disposable retired pay of a member in the manner described in paragraph (1) unless the court has jurisdiction over the member by reason of (A) his residence, other than because of military assignment, in the territorial jurisdiction of the court, (B) his domicile in the territorial jurisdiction of the court, or (C) his consent to the jurisdiction of the court.

* * * *

(e) Limitations.--(1) The total amount of the disposable retired pay of a member payable under all court orders pursuant to subsection (c) may not exceed 50 percent of such disposable retired pay.

(2) In the event of effective service of more than one court order which provide for payment to a spouse and one or more former spouses or to more than one former spouse, the disposable retired pay of the member shall be used to satisfy (subject to the limitations of paragraph (1)) such court orders on a first-come, first-served basis. Such court orders shall be satisfied (subject to the limitations of paragraph (1)) out of that amount of disposable retired pay which remains after the satisfaction of all court orders which have been previously served.

(3)(A) In the event of effective service of conflicting court orders under this section which assert to direct that different amounts be paid during a month to the same spouse or former spouse of the same member, the Secretary concerned shall--

(i) pay to that spouse from the member's disposable retired pay the least amount directed to be paid during that month by any such conflicting court order, but not more than the amount of disposable retired pay which remains available for payment of such court orders based on when such court orders were effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4);

(ii) retain an amount of disposable retired pay that is equal to the lesser of--

(I) the difference between the largest amount required by any conflicting court order to be paid to the spouse or former spouse and the amount payable to the spouse or former spouse under clause (i); and

(II) the amount of disposable retired pay which remains

available for payment of any conflicting court order based on when such court order was effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4); and

(iii) pay to that member the amount which is equal to the amount of that member's disposable retired pay (less any amount paid during such month pursuant to legal process served under section 459 of the Social Security Act (42 U.S.C. 659) and any amount paid during such month pursuant to court orders effectively served under this section, other than such conflicting court orders) minus--

(I) the amount of disposable retired pay paid under clause (i); and

(II) the amount of disposable retired pay retained under clause (ii).

(B) The Secretary concerned shall hold the amount retained under clause (ii) of subparagraph (a) until such time as that Secretary is provided with a court order which has been certified by the member and the spouse or former spouse to be valid and applicable to the retained amount. Upon being provided with such an order, the Secretary shall pay the retained amount in accordance with the order.

(4)(A) In the event of effective service of a court order under this section and the service of legal process pursuant to section 459 of the Social Security Act (42 U.S.C. 659), both of which provide for payments during a month from the same member, satisfaction of such court orders and legal process from the retired pay of the member shall be on a first-come, first-served basis. Such court orders and legal process shall be satisfied out of moneys which are subject to such orders and legal process and which remain available in accordance with the limitations of paragraph (1) and subparagraph (B) of this paragraph during such month after the satisfaction of all court orders or legal

process which have been previously served.

(B) Notwithstanding any other provision of law, the total amount of the disposable retired pay of a member payable by the Secretary concerned under all court orders pursuant to this section and all legal processes pursuant to section 459 of the Social Security Act (42 U.S.C. 659) with respect to a member may not exceed 65 percent of the amount of the retired pay payable to such member that is considered under section 462 of the Social Security Act (42 U.S.C. 662) to be remuneration for employment that is payable by the United States.

(5) A court order which itself or because of previously served court orders provides for the payment of an amount which exceeds the amount of disposable retired pay available for payment because of the limit set forth in paragraph (1), or which, because of previously served court orders or legal process previously served under section 459 of the Social Security Act (42 U.S.C. 659), provides for payment of an amount that exceeds the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4), shall not be considered to be irregular on its face solely for that reason. However, such order shall be considered to be fully satisfied for purposes of this section by the payment to the spouse or former spouse of the maximum amount of disposable retired pay permitted under paragraph (1) and subparagraph (B) of paragraph (4).

(6) Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out of disposable retired pay under this section have been made in the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4). Any such unsatisfied obligation of a member may be enforced by any

means available under law other than the means provided under this section in any case in which the maximum amount permitted under paragraph (1) has been paid and under section 459 of the Social Security Act (42 U.S.C. 659) in any case in which the maximum amount permitted under subparagraph (B) of paragraph (4) has been paid.

{Added Pub.L. 97-252, Title X, § 1002(a), Sept. 8, 1982, 96 Stat. 730, and amended Pub.L. 98-525, Title VI, § 643(a) to (d), Oct. 19, 1984, 98 Stat. 2547; Pub.L. 99-661, Div. A, Title VI, § 644(a), Nov. 14, 1986, 100 Stat. 3887; Pub.L. 100-26, §§ 3(3), 7(h)(1), Apr. 21, 1987, 101 Stat. 273, 282; Pub.L. 101-189, Div. A, Title VI, § 653(a)(5), Title XVI, § 1622(e)(6), Nov. 29, 1989, 103 Stat. 1462, 1605; Pub.L. 101-510, Div. A, Title V, § 555(a) to (d), (f), (g), Nov. 5, 1990, 104 Stat. 1569, 1570; Pub.L. 102-190, Div. A, Title X, § 1061(a)(7), Dec. 5, 1991, 105 Stat. 1472; Pub.L. 102-484, Div. A, Title VI, § 653(a), Oct. 23, 1992, 106 Stat. 2426; Pub.L. 103-160, Div. A, Title V, § 555(a), (b), Title XI, § 1182(a)(2), Nov. 30, 1993, 107 Stat. 1666, 1771; Pub.L. 104-106, Div. A, Title XV, § 1501(c)(16), Feb. 10, 1996, 110 Stat. 499; Pub.L. 104-193, Title III, §§ 362(c), 363(c)(1) to (3), Aug. 22, 1996, 110 Stat. 2246, 2249; Pub.L. 104-201, Div. A, Title VI, § 636, Sept. 23, 1996, 110 Stat. 2579; Pub.L. 105-85, Div. A, Title X, § 1073(a)(24), (25), Nov. 18, 1997, 111 Stat. 1901; Pub.L. 107-107, Div. A, Title X, § 1048(c)(9), Dec. 28, 2001, 115 Stat. 1226.}

UNITED STATES CODE ANNOTATED

TITLE 38. VETERANS' BENEFITS

PART IV--GENERAL ADMINISTRATIVE PROVISIONS

CHAPTER 53--SPECIAL PROVISIONS RELATING TO BENEFITS

§ 5301. Nonassignability and exempt status of benefits.

(a) (1) Payments of benefits due or to become due under any law administered by the Secretary shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. The preceding sentence shall not apply to claims of the United States arising under such laws nor shall the exemption therein contained as to taxation extend to any property purchased in part or wholly out of such payments. The provisions of this section shall not be construed to prohibit the assignment of insurance otherwise authorized under chapter 19 of this title, or of servicemen's indemnity.

(2) For the purposes of this subsection, in any case where a payee of an educational assistance allowance has designated the address of an attorney-in-fact as the payee's address for the purpose of receiving a benefit check and has also executed a power of attorney giving the attorney-in-fact authority to negotiate such benefit check, such action shall be deemed to be

an assignment and is prohibited.

(3) (A) This paragraph is intended to clarify that, in any case where a beneficiary entitled to compensation, pension, or dependency and indemnity compensation enters into an agreement with another person under which agreement such other person acquires for consideration the right to receive such benefit by payment of such compensation, pension, or dependency and indemnity compensation, as the case may be, except as provided in subparagraph (B), and including deposit into a joint account from which such other person may make withdrawals, or otherwise, such agreement shall be deemed to be an assignment and is prohibited.

(B) Notwithstanding subparagraph (A), nothing in this paragraph is intended to prohibit a loan involving a beneficiary under the terms of which the beneficiary may use the benefit to repay such other person as long as each of the periodic payments made to repay such other person is separately and voluntarily executed by the beneficiary or is made by preauthorized electronic funds transfer pursuant to the Electronic Funds Transfers Act (15 U.S.C. 1693 et seq.).

(C) Any agreement or arrangement for collateral for security for an agreement that is prohibited under subparagraph (A) is also prohibited and is void from its inception.

(b) This section shall prohibit the collection by setoff or otherwise out of any benefits payable pursuant to any law administered by the Secretary and relating to veterans, their estates, or their dependents, of any claim of the United States or any agency thereof against (1) any person other than the indebted beneficiary or the beneficiary's estate; or (2) any beneficiary or the beneficiary's estate except amounts due the United States by such beneficiary or the beneficiary's estate by reason of overpayments or illegal payments made under such

laws to such beneficiary or the beneficiary's estate or to the beneficiary's dependents as such. If the benefits referred to in the preceding sentence are insurance payable by reason of yearly renewable term insurance, United States Government life insurance, or National Service Life Insurance issued by the United States, the exemption provided in this section shall not apply to indebtedness existing against the particular insurance contract upon the maturity of which the claim is based, whether such indebtedness is in the form of liens to secure unpaid premiums or loans, or interest on such premiums or loans, or indebtedness arising from overpayments of dividends, refunds, loans, or other insurance benefits.

(c)(1) Notwithstanding any other provision of this section, the Secretary may, after receiving a request under paragraph (2) of this subsection relating to a veteran, collect by offset of any compensation or pension payable to the veteran under laws administered by the Secretary the uncollected portion of the amount of any indebtedness associated with the veteran's participation in a plan prescribed in chapter 73 of title 10.

(2) If the Secretary concerned (as defined in section 101(5) of title 37) has tried under section 3711(a) of title 31 to collect an amount described in paragraph (1) of this subsection in the case of any veteran, has been unable to collect such amount, and has determined that the uncollected portion of such amount is not collectible from amounts payable by that Secretary to the veteran or that the veteran is not receiving any payment from that Secretary, that Secretary may request the Secretary to make collections in the case of such veteran as authorized in paragraph (1) of this subsection.

(3)(A) A collection authorized by paragraph (1) of this subsection shall be conducted in accordance with the procedures prescribed in section 3716 of title 31 for administrative offset

collections made after attempts to collect claims under section 3711(a) of such title.

(B) For the purposes of subparagraph (A) of this paragraph, as used in the second sentence of section 3716(a) of title 31--

(i) the term "records of the agency" shall be considered to refer to the records of the department of the Secretary concerned; and

(ii) the term "agency" in clauses (3) and (4) shall be considered to refer to such department.

(4) Funds collected under this subsection shall be credited to the Department of Defense Military Retirement Fund under chapter 74 of title 10 or to the Retired Pay Account of the Coast Guard, as appropriate.

(d) Notwithstanding subsection (a) of this section, payments of benefits under laws administered by the Secretary shall not be exempt from levy under subchapter D of chapter 64 of the Internal Revenue Code of 1986 (26 U.S.C. 6331 et seq.).

(e) In the case of a person who--

(1) has been determined to be eligible to receive pension or compensation under laws administered by the Secretary but for the receipt by such person of pay pursuant to any provision of law providing retired or retirement pay to members or former members of the Armed Forces or commissioned officers of the National Oceanic and Atmospheric Administration or of the Public Health Service; and

(2) files a waiver of such pay in accordance with section 5305 of this title in the amount of such pension or compensation before the end of the one-year period beginning on the date such person is notified by the Secretary of such person's eligibility for such pension or compensation, the retired or retirement pay of such person shall be exempt from taxation, as provided in subsection (a) of this section, in an amount equal to the amount

of pension or compensation which would have been paid to such person but for the receipt by such person of such pay.

{Pub.L. 85-857, Sept. 2, 1958, 72 Stat. 1229, § 3101; Pub.L. 94-502, Title VII, § 701, Oct. 15, 1976, 90 Stat. 2405; Pub.L. 95-479, Title III, § 301, Oct. 18, 1978, 92 Stat. 1564; Pub.L. 97-295, § 4(74), Oct. 12, 1982, 96 Stat. 1310; Pub.L. 99-576, Title V, § 504, Title VII, § 701(68), Oct. 28, 1986, 100 Stat. 3286, 3296; renumbered § 5301 and amended Pub.L. 102- 40, Title IV, § 402(b)(1), (d)(1), May 7, 1991, 105 Stat. 238, 239; Pub.L. 102-54, § 14(d)(2), June 13, 1991, 105 Stat. 285; Pub.L. 102-83, 4(a)(1), (2)(A)(vii), (b)(1), (2)(E), (4)(C), Aug. 6, 1991, 105 Stat. 403- 405; Pub.L. 102-86, Title V, § 505(a), Aug. 14, 1991, 102 Stat. 426; Pub.L. 101-189, Div. A, Title XIV, § 1404(b)(2), Nov. 29, 1989, 103 Stat. 1586; Pub.L. 102-25, Title VII, § 705(c)(2), Apr. 6, 1991, 105 Stat. 120; renumbered and amended Pub.L. 102-40, Title IV, § 402(b)(1), (d)(1), May 7, 1991, 105 Stat. 238, 239; Pub.L. 102-54, § 14(d)(2), June 13, 1991, 105 Stat. 285; Pub.L. 102-83, § 4(a)(1), (2)(A)(vii), (b)(1), (4)(C), Aug. 6, 1991, 105 Stat. 403-405; Pub.L. 102-86, Title V, § 505(a), Aug. 14, 1991, 102 Stat. 426; Pub. L. No. 108-183, § 702, Dec. 16, 2003.}